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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KAROLYN BERKMAN et al., Plaintiffs and Appellants, v. SHI-YIN WONG et al., Defendants and Respondents.	B204988 (Los Angeles County Super. Ct. No. BC309639)

APPEAL from a judgment of the Superior Court of Los Angeles County. Judith C. Chirlin, Judge. Affirmed.

Klika, Parrish & Bigelow and Peter Klika for Plaintiffs and Appellants.

Foley & Lardner, Tami S. Smason and Lori V. Minassian for Defendants and Respondents.

Plaintiffs, limited partners, appeal from a judgment after court trial, in favor of the corporate general partner and its board chairman, in a class action for negligence, breach of contract, breach of fiduciary duty, and breach of covenant of good faith and fair dealing. Plaintiffs assert error in the denial of their motion to file a second amended complaint, the respective grant and denial of motions for judgment on the pleadings with respect to an accounting cause of action, and numerous aspects of the trial court's decision and statement of decision. In addition, plaintiffs seek to challenge an order refusing to disqualify defendants' attorneys for conflict, from which plaintiffs dismissed a prior appeal. Discerning no prejudicial error, we affirm the judgment.

FACTS

The action was commenced in January 2004, and the operative first amended complaint (FAC) was filed the next month. The FAC alleged that plaintiffs, 16 named individuals, were limited partners of Pacific Alliance Medical Center, Ltd. (the partnership), and were suing for themselves and all other such limited partners, under the class action provisions of Code of Civil Procedure section 382 and Corporations Code section 15701.[1] (Undesignated section references are to the Corporations Code.) The named defendants were the partnership's general partner, Pacific Alliance Medical Center, Inc. (the corporation), and its board president, Dr. Shi-Yin Wong (Wong).

Under the 1989 Agreement of Limited Partnership (agreement), which was attached to the FAC, the partnership's business was to acquire, own, and operate a hospital in the Chinatown area of Los Angeles, formerly French Hospital. The agreement in terms did not foreclose the partnership "from engaging in such additional lawful activities as the General Partner may . . . determine to be appropriate." (§ 1.3.)

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[1] Corporations Code section 15701 provides that a limited partner may bring a class action on behalf of all or a class of a partnership's limited partners, "to enforce any claim common to those limited partners," and "any such action shall be governed by the law governing class actions generally, provided that in order to maintain the class action there shall be no requirement that the class be so numerous that joinder of all members is impracticable."

In four causes of action, plaintiffs alleged that the corporation had violated the partnership agreement, acted negligently, and, together with Wong, breached fiduciary duties and the covenant of good faith, all through various actions in managing the partnership and handling its assets. (As discussed below, a fifth cause of action, for accounting, was dismissed before trial.)

The alleged wrongful conduct as stated in the FAC included: (1) Transfer of $5 million of partnership funds to Shanghai, China, and Wong's use of all or part of those funds to purchase a house and a condominium, in his own name. (2) Failure to provide the limited partners reports of all fees the partnership paid the corporation for services to the partnership. (The corporation's management fee allegedly was increased in 1998, from zero to $500,000, or a greater amount depending on the partnership's income.) (3) Allowing $880,000 of partnership funds to be invested without recovery in a joint venture in China. (4) Making substantial advances, to an unidentified partnership officer in 2002. The FAC prayed damages as proven, an accounting, and attorney fees under Code of Civil Procedure section 1021.5.

Plaintiffs moved for class certification in September 2004. After a December 1, 2004 hearing, the trial court granted certification on February 24, 2005. Pursuant to stipulation, the court on July 29, 2005 ordered the action stayed – together with several related cases – until October 20, 2005, pending an accounting that had been agreed to in mediation.

Trial was set for May 21, 2007. In February 2007, plaintiffs moved for leave to file a second amended complaint, adding as defendants (in place of "does") seven additional officers or board members of the corporation. Plaintiffs' attorney declared he had provided the proposed pleading to defendants' counsel in late December, 2006. The new complaint proposed to add causes of action for constructive and actual fraud, each requesting punitive damages. It alleged various additional events, most of which were alleged to have transpired before the FAC.

Defendants opposed the motion to amend, asserting both legal grounds and that the motion was untimely and its grant would cause defendants prejudice. At the hearing

on February 7, 2007, plaintiffs averred that defendants' attorneys had an "unwaivable conflict" in representing defendants, requiring disqualification. Counsel stated he had previously objected to the attorneys' representation "on an ongoing basis." Regarding amendment, plaintiffs admitted "that there was a long delay in this case," but urged it had not been unreasonable. Plaintiffs represented that if the court were concerned about further delay, the proffered amended complaint could be filed as a new action. The court denied the motion to amend, stating that the prejudice, delay, and expense to defendants so warranted. Plaintiffs later did file a separate action, which included one of the two additional claims they had sought to add by amendment.

In March 2007, plaintiffs concurrently noticed two further motions. First, plaintiffs moved for judgment on the pleadings on their accounting cause of action, arguing that as limited partners they were statutorily entitled to an accounting of the partnership, under section 15510, subdivision (b). Defendants countered with a cross-motion for judgment on the pleadings. It noted that section 15510 was part of California's original Uniform Limited Partnership Act, and did not govern limited partnerships (like this partnership) that were created after July 1, 1984 (when the Revised Uniform Limited Partnership Act, section 15611 et seq., became effective). The corporation also opposed plaintiffs' motion, arguing that the pleading did not allege, as the superseded statute required, that there were circumstances rendering an accounting "just and equitable." Plaintiffs responded that several of the partnership's financial deficiencies, as alleged, justified an accounting.

Plaintiffs' second motion sought to disqualify defendants' attorneys (Foley & Lardner; the attorneys), on grounds of "irreconcilable" conflict. Plaintiffs noted that the partnership was a client of the attorneys, which meant, plaintiffs argued, that the attorneys also represented the limited partners. By now appearing for the corporation and Wong, the attorneys stood in conflict with their partnership clients. Defendants opposed this motion on grounds it was untimely and tactical, as plaintiffs had been aware of the facts for three years; plaintiffs lacked standing, since they were not and never had been clients of the attorneys; and there was no conflict.

After a combined hearing on April 13, 2007, the court denied plaintiffs' motions, and granted defendants' motion for judgment on the pleadings on the accounting claim. On May 11, 2007, plaintiffs filed a notice of appeal from the order denying the motions to disqualify the attorneys and granting the motion for judgment on the pleadings. Eight months later, on January 8, 2008, plaintiffs filed a request to dismiss that appeal, and this court did so a few days later. On July 6, 2007, plaintiffs filed a petition for writ of mandate, challenging the same orders (as well as another order not here at issue). The petition was denied as untimely, on July 13, 2007.[2]

The action proceeded to trial in July 2007, jointly with four other cases that had been found to be related. In the present case, the court rendered an intended decision favorable to defendants. Following requests, defendants' counsel prepared a consolidated statement of decision, which closely tracked the court's intended decision. The trial court overruled plaintiffs' objections to the proposed statement and judgment, and signed them. Plaintiffs then filed the present appeal.

DISCUSSION

1. The Dismissed Appeal.

Defendants initially assert that, having filed but then dismissed a pretrial appeal from the orders denying the motion to disqualify attorneys and granting defendants' motion for judgment on the pleadings re accounting, plaintiffs are barred, under Code of Civil Procedure section 913, from contesting those rulings in the present appeal. We conclude that this claim is partly correct.

Code of Civil Procedure section 913 provides: "The dismissal of an appeal shall be with prejudice to the right to file another appeal within the time permitted, unless the dismissal is expressly made without prejudice to another appeal." This statute appears to preclude the present appeal insofar as it concerns the order denying attorney disqualification. That order was appealable upon rendition, (e.g., *Roush v. Seagate*

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[2] We have taken judicial notice of the records of plaintiffs' prior appeal and writ proceeding.

Technology, LLC (2007) 150 Cal.App.4th 210, 218), and plaintiffs did so appeal from it. Neither plaintiffs in their request for dismissal, nor this court in its order dismissing the appeal, stated the dismissal was without prejudice. Plaintiffs' present effort again to appeal from the disqualification order is precluded under Code of Civil Procedure section 913.

Plaintiffs argue the statute does not apply, because the present appeal is from the judgment, rather than from the order, as before, "within the time permitted." (Code Civ. Proc., § 913.) In fact, the present notice of appeal states that plaintiffs' appeal is taken from the attorney disqualification order, as well as the judgment. To review the order on the appeal from the judgment would allow an "end run" around the previous dismissal of a viable appeal, not contemplated by the statute. Having once undertaken and abandoned appellate review of the disqualification order, plaintiffs may not now obtain it on the appeal from the judgment.[3]

A different conclusion applies insofar as plaintiffs' prior appeal was purportedly taken from the order granting defendants' motion for judgment on the pleadings, as to plaintiffs' accounting claim. That order was *not* directly appealable. (6 Witkin, Cal. Procedure, *supra*, Proceedings Without Trial § 197, p. 637.) And unlike some other orders prefatory to judgment (such as an order sustaining a demurrer to a complaint without leave to amend, or granting a motion for summary judgment), the order was not, when rendered, convertible into an appealable judgment. Because the ruling truncated only one of five causes of action, leaving the rest pending between the same parties, the trial court was powerless to render a final judgment with respect to the accounting cause of action alone. (Cf. *California Dental Assn. v. California Dental Hygienists' Assn.* (1990) 222 Cal.App.3d 49, 58-59.)

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[3] There would in any event be no basis for reversal. "Prejudice must be shown where the issue of attorney disqualification is raised on appeal from final judgment; i.e., it must be established 'that the erroneous granting or denying of a motion to disqualify affected the outcome of the proceeding to the prejudice of the complaining party.' [Citation.]" (1 Witkin, Cal. Procedure (5th ed. 2008) Attorneys § 108, pp. 149-150.) Plaintiffs have not shown such prejudice.

Substantial authority, applying the predecessor statute to Code of Civil Procedure section 913, holds that the statutory bar to a second appeal does not arise from the dismissal of an initial appeal that could not have proceeded on the merits. "An appeal dismissed because there was nothing to appeal from will not preclude another appeal in the same case when a record shall have been made up from which an appeal can be taken." (*In re Rose's Estate* (1889) 80 Cal. 166, 170-171; accord *Howard v. Howard* (1927) 87 Cal.App. 20, 26.) The statute was more recently held not to apply where the first appeal was taken from a nonappealable order. (*King v. Goldberg* (1958) 159 Cal.App.2d 543, 547-548.) Imposing a bar because the appellant dismissed an appeal that was jurisdictionally void does not subserve the statutory purpose of avoiding repeated, dilatory appellate challenges. (See *Howard v. Howard*, *supra*, 87 Cal.App. at p. 26.) We conclude that plaintiffs are not precluded, by Code of Civil Procedure section 913, from obtaining postjudgment review of the order granting judgment on the pleadings with respect to their accounting cause of action.[4]

2. Denial of Leave to File Further Amended Complaint.

Plaintiffs contend the trial court abused its discretion when it denied them leave to file a second amended complaint, which would have added two new causes of action and seven new defendants three months before the scheduled trial date. In argument of the motion, plaintiffs averred that if it were denied, they could yet advance their claims through a new action. And that is what plaintiffs effectively did, after the court denied leave to amend. For this reason, quite apart from the trial court's balancing of prejudice,

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[4] In *Patchett v. Bergamot Station, Ltd.* (2006) 143 Cal.App.4th 1390, 1396, this division ruled that a party that had appealed from an order compelling arbitration, forestalling arbitration proceedings, then stipulated to dismissal of the appeal 13 months later, after it had been briefed, could not again seek review of the preliminary order, on a subsequent appeal from a judgment confirming the arbitration award. This alternative holding was not, however, strictly based on Code of Civil Procedure section 913. And we noted in our ruling that the original appeal might have been adjudicated as a writ proceeding. In contrast, in this case we summarily denied plaintiffs' petition for a writ.

plaintiffs have not established that the ruling was ultimately prejudicial, and therefore their contention is unavailing.

3. The Accounting Claim.

Plaintiffs' next contention is that the court erred by granting judgment on the pleadings on plaintiffs' accounting cause of action, rather than denying the motion or allowing leave to amend that claim. Plaintiffs necessarily concede that the statute their pleading cited as authorizing an accounting (§ 15510) did not apply to this case. But plaintiffs contend that defendants' fiduciary relationship to them, and the allegations of misused and lost partnership funds incorporated by reference, yet entitled them to assert an accounting claim.

In appropriate circumstances, a general partner of a limited partnership owes fiduciary duties to the limited partners, including a duty to the partnership to account for property or benefit derived from the conduct of the partnership or from partnership property. (§§ 15643, 16404, subds. (a), (b)(1).) To this extent, these statutes resemble section 15510, subdivision (b)(1). Moreover, plaintiffs' allegations that the corporation and Wong improperly diverted partnership funds and assets met the requirements for seeking an accounting. (See 5 Witkin, Cal. Procedure, *supra*, Pleading § 820, p. 236.) The court thus should not have precluded plaintiff from doing so. However, the error was harmless, because, as discussed below, the court ultimately found that the alleged wrongdoing, predicate to an accounting, either did not occur or did not cause damage, and those findings are supported by substantial evidence.

4. The Statement of Decision.

As reflected in its statement of decision, the trial court determined all of plaintiffs' claims in favor of defendants. The court found and concluded that: the real estate purchases in China were made by or on behalf of the partnership; defendants did not divert partnership funds to their own benefit; the partnership's distributions to the class members were made in accordance with the partnership agreement; and the monies supposedly "unrecovered" in China had been accounted for. In addition, the court found that plaintiffs had not shown fraud in connection with their breach of fiduciary claims,

that the partnership agreement had not been breached, and that plaintiffs had not proven damages.

Plaintiffs raise a number of specific disputes with the court's findings and conclusions, which plaintiffs contend warrant reversal of the judgment. We resolve those disputes as follows.

A. Partnership Distributions. In rejecting their contention that partnership distributions had been improperly restricted, the court observed (in dictum) that the partnership's "general partner has sole discretion regarding distribution of partnership profits." Plaintiffs insist that this statement is unsupported by, and at odds with, the relevant language of the agreement, section 4.4(a), which states that "cash shall be distributed at such times as shall be determined by the General Partner after considering the cash needs of the Partnership including requirements for working capital and reserves. Distributable cash shall be distributed to the Partners in proportion to their Units."

The trial court accurately construed the section. It confers authority over the distribution of partnership cash upon the general partner, who shall consider what the partnership needs to retain. Contrary to plaintiffs' interpretation, the provision does not require distribution of all funds not necessary for working capital and reserves.

Plaintiffs further contend that the general partner had a supervening fiduciary duty to them not to minimize or arbitrarily withhold distributions. (See *BT-I v. Equitable Life Assurance Society* (1999) 75 Cal.App.4th 1406, 1412-1413, discussing *Labovitz v. Dolan* (1989) 189 Ill.App.3d 403 [545 N.E.2d 304].) As proof that the corporation violated this duty, plaintiffs cite Wong's testimony that he preferred to pay an amount sufficient to cover income taxes on the partner's share, plus $5,000 or $10,000, while plaintiff Berkman testified she hadn't received enough to cover her taxes. Plaintiffs also cite a lending agreement with the partnership's ongoing lender, which provided that distributions could be made only for the lesser of a partner's tax liability or 55 percent of his or her share of net partnership income. Plaintiffs contend that this term improperly

revised the agreement's distribution provisions, without having been adopted as an amendment to the agreement.

In response, defendants cite testimony that distributions were made sufficient to cover taxes at least. Defendants' tax expert opined, upon review of partnership records and plaintiff Berkman's tax returns, that she had received distributions greater than her entire federal tax liability – not only that stemming from her share of partnership income – except for one year, in which there was a small shortfall. There was also evidence that the limited partners approved the lending agreement, when it was amended to increase the partnership's borrowing limit. And that agreement did not equate with an amendment to the partnership agreement. Overall, there was substantial evidence that plaintiffs did not suffer wrong or damage on account of the defendants' handling of distributions.

B. Shanghai Real Estate. The evidence showed that Wong, and another individual named Wang, each used partnership funds to acquire property (a condominium and a house, respectively) in Shanghai, China. The purchases were made in their names, and only later were the properties booked to the partnership. Profits from renting the properties went to the partnership. The trial court found that Wong and Wang had bought the properties as agents of the partnership, and rejected plaintiffs' claims that defendants used partnership funds for their own purposes, and improperly shared them with Wang.

Plaintiffs object to the court's conclusions, first, on grounds Wong and Wang did not have written real estate agency agreements with the partnership when the properties were purchased. Plaintiffs assign this as a violation of Civil Code section 1624, subdivision (a)(4), the statute of frauds. But plaintiffs show no consequent loss to the partnership, or fallacy in the trial court's findings of actual agency. Neither the partnership nor the agents disclaimed the purchases, or denied that they were the partnership's. The same lack of consequence holds true with respect to plaintiffs' complaint that the manner in which the properties were acquired violated paragraph 1.7 of the agreement, requiring that "Title to any assets acquired to effect the purposes of the Partnership shall be held solely in the name of the Partnership."

Other alleged violations of the agreement in connection with the real estate acquisitions also do not require reversal. First, plaintiffs claim that use in the acquisitions of both partnership funds and other funds which Wong and Wang borrowed violated section 7.7, regarding "Bank Accounts," which states that all partnership funds shall be deposited in bank accounts in the partnership's name, and "shall not be commingled with any other funds." But the joint use of partnership and other funds to purchase real property does not violate either requirement of this provision. Second, section 1.5 of the agreement states that before conducting business in any jurisdiction, the partnership "shall comply with all requirements for the qualification of the Partnership to conduct business as a limited partnership in such jurisdiction." Wong testified that the partnership did not register to do business in China before it bought the properties, and plaintiffs cite this as a breach of section 1.5. But even assuming it was, plaintiffs do not point to any damage from the failure to register.

C. Books and Records. In discussing plaintiffs' failure to establish damages, the trial court stated that plaintiffs "failed to demonstrate that there is any irregularity or inaccuracy in the partnership's books and records." Plaintiffs now challenge this observation, claiming that there were numerous such inaccuracies or irregularities. Even if true, this claim would not impair the judgment, because plaintiffs do not argue that they suffered damages as a consequence. Plaintiffs' only claim of prejudice is that the several errors or omissions establish that plaintiffs should have been allowed an accounting. But the evidence sufficiently documented the elements of the partnership's financial dealings and condition with which the FAC was concerned, and therefore those few discrepancies that plaintiffs establish did not make the denial of an accounting prejudicial.

Many of the discrepancies that plaintiffs cite appeared in documents other than partnership records. Others involved things different from record discrepancies (such as the alleged commingling and the lack of contemporaneous written agent authorizations). Yet others comprised lack of records for transactions that were not subjects of plaintiffs' pleaded claims. As for the rest, plaintiffs emphasize that the 2002 financial statement did not specifically reflect the Shanghai properties. But this caused no damage. Another

concern was the presence of several ballots, filled out by board members of the corporation, in a vote by the limited partners regarding a proposal to transfer the hospital to a charitable corporation. But the ultimate tally shows that these votes did not affect the limited partners' negative decision on the proposal.

D. Asserted Breaches. Plaintiffs complain of two further alleged breaches of the agreement. First, plaintiffs invoke section 7.2(d), which provides that the general partner shall quarterly provide each partner a statement of all fees paid to the general partner for services to the partnership, describing who was compensated and at what rate. Apparently no such statements were sent. Edwards, the CEO of both the partnership and the corporation, declared that he believed none was required, because the requirement referred to work done as a contractor, not as general partner per se. This interpretation accords with the agreement's original provision forbidding any compensation of the general partner for its services as such, a provision that was later changed to allow sizeable management fees. In any event, plaintiffs once more show no damages from any violation.

Second, plaintiffs revisit the lending agreement's limitation of distributions, and argue that it constituted a breach of section 14.4, which provides that the agreement shall not be amended to change, without full consideration, a partner's participation in profits, losses, or distributions. But once again, whatever may be said of the lending agreement's distribution limits, they did not amend the partnership agreement, and so there was no violation of section 14.4.[5]

E. Fraud. Plaintiffs' final contention is that findings the court made about the absence of "fraud" in certain transactions were unwarranted, because plaintiffs did not advance a fraud claim at trial. (See Code Civ. Proc., § 632 [statement of decision shall explain basis of the court's decision as to "each of the principal controverted issues at

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[5] Plaintiffs also protest the statement of decision's statement that defendants' challenged activities fell within not only the agreement but also the business judgment rule. Plaintiffs' point is that the rule cannot justify clear breaches of the agreement. That is correct, but irrelevant, because the court did not hold to the contrary.

trial"].) Plaintiffs assert that the findings regarding fraud should not serve as res judicata or collateral estoppel with respect to the lawsuit plaintiffs filed after being denied leave to file an amended complaint, which contains causes of action labeled "constructive fraud" and "fraudulent concealment."

In the relevant portion of the statement of decision, the court found that plaintiffs failed to prove fraud or misrepresentation by the corporation "related to the China investments, as well as the voting with respect to the proposed donation of the hospital." As to the former, the court found that the evidence did not support plaintiffs' contention that agency agreements with Wong and Wang were written to assist defendants in "perpetrating fraud." And regarding the balloting in which board members of the corporation submitted ballots, the court found that the ballots were not counted, the proposal didn't pass, and plaintiffs "failed to demonstrate any intent by [the corporation] to defraud the limited partners, or any damages resulting from any alleged misrepresentation."

That is the full extent of the "fraud" findings.[6] Whether or not they exceeded the issues presented at trial has not been shown, but plaintiffs will be free to document that position, if necessary, if and when res judicata or collateral estoppel claims are properly asserted. But that is not now.

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[6] Defendants assert that the court also rejected a fraud claim about management fees. No such finding appears in the statement of decision.

DISPOSITION

The judgment is affirmed.

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BAUER., J.*

We concur:

RUBIN, Acting P. J.

BIGELOW, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.